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IN THE

Supreme Court of the United States

October Term, 1943

No. 570

BLACK

vs.

PIONEER

and

TAMPA INTER-

PET

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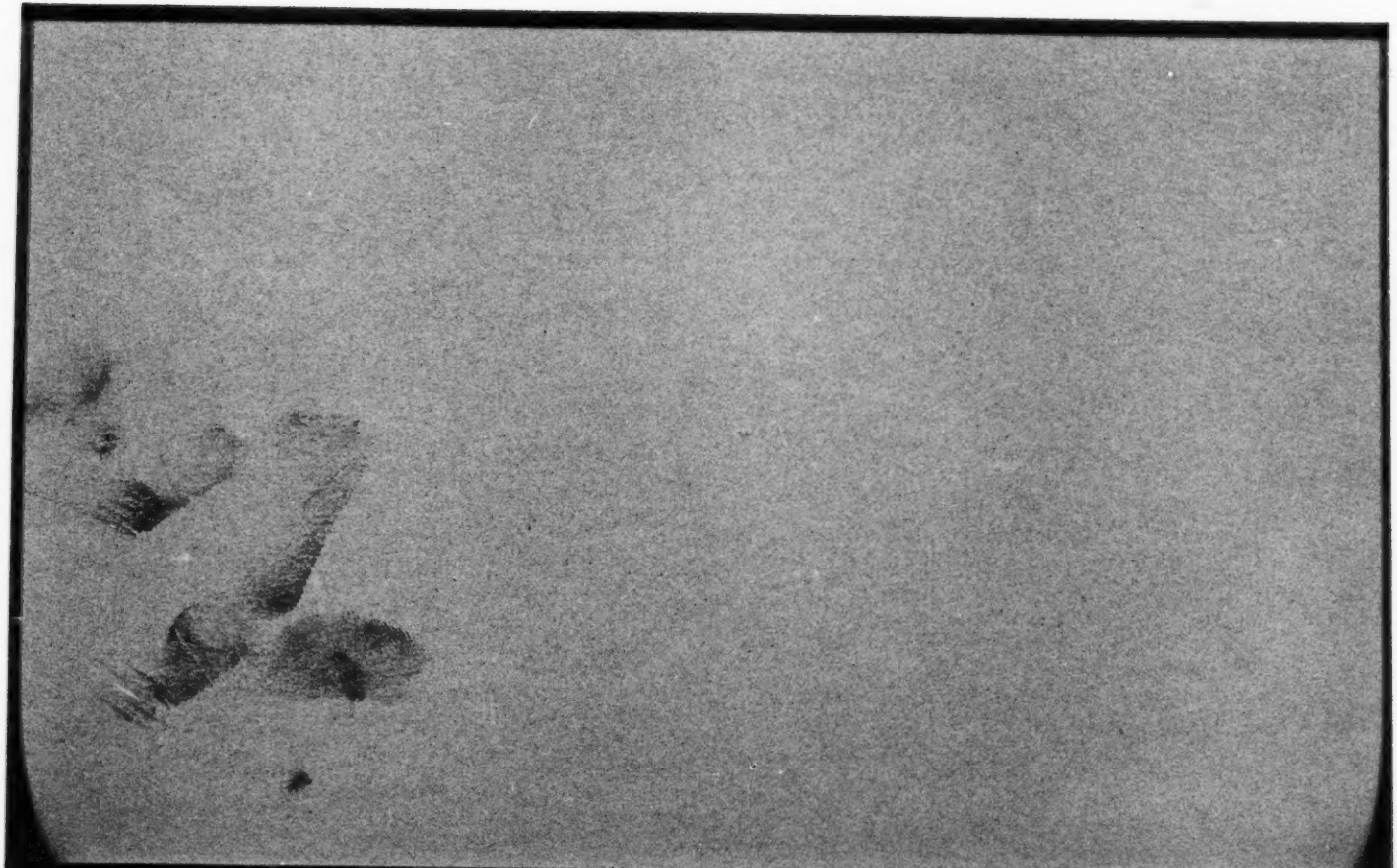
Hunt,



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IN THE

Supreme Court of the United States

OCTOBER TERM—1943

No. ....

BLACK DIAMOND LINES, INC.,
Petitioner
(Respondent-Appellant below),

against

PIONEER IMPORT CORPORATION,
Respondent
(Libellant-Appellee below),

and

TAMPA INTER-OCEAN STEAMSHIP COMPANY,
Respondent
(Claimant-Appellant-Appellee below).

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner herein prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit, to review a decree of that Court entered December 8, 1943 (R. 979), affirming an inter-

locutory decree of the United States District Court for the Southern District of New York in favor of the respondent, Pioneer Import Corporation (libellant in the District Court).

Jurisdiction.

The date of the decree of the Circuit Court of Appeals to be reviewed is December 8, 1943 (R. 979). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. § 347(a)) and under General Rule 38 of this Court, Section 5, subdivision (b).

Statement.

This is a suit by the respondent, Pioneer Import Corporation (hereafter called "Pioneer") against the steamer Lafcomo and the petitioner, the charterer of the vessel, to recover for damage to a shipment of 1847 cases and 20 bundles of four cases each of lily of the valley pips (hereafter called "pips"), which were transported by the Lafcomo from Rotterdam, The Netherlands, to New York, in November-December, 1939 (R. 6-9). The pip of the lily of the valley is the part which contains the flower bud and the leaves and it is attached to rather long fibrous roots (Patterson, R. 91). The Lafcomo was claimed by her owner, the respondent, Tampa Inter-Ocean Steamship Company, which will hereafter be called "Tampa Inter-Ocean."

The respondent, Pioneer, is a New York corporation, but the United States Alien Property Custodian has vested 85.71% of its capital stock (R. 43). In the year 1939 it became the exclusive channel through which pips from Germany could be acquired and brought into the United States (G. Patterson, R. 89, 90; Niemann, R. 360).

These pips were grown in Wittenberg, Germany, were packed in moist sphagnum moss in wooden cases in October and November, 1939, and were transported by rail and motor truck from Germany to Rotterdam in the latter part of November (Philippo, Dir. Ints. 6-9; R. 592-595; Van Noort, Cross Int. 7(d) and (e); R. 611).

The pips originally were booked in the latter half of November for carriage under refrigeration on the steamer Statendam of Holland-America Line. About that time, however, the British Government announced that an embargo on goods of German origin would be imposed within a few days and as a result the Holland-America Line cancelled the booking (Van Noort, Cross Ints. 2, 5; R. 609, 610).

The universal practice for a great many years has been to transport pips under refrigeration. That is the only safe way to carry them. The reason is that refrigeration keeps the pips dormant or "asleep" (Langeler, R. 477, 479; Kuer, R. 504). Otherwise they will sprout. Pips also must have a continuous circulation of fresh air around them, even under refrigeration, to prevent sprouting. The cases in which pips are carried are fitted with cleats on both sides to provide a space for air circulation when they are set down. On occasions a warehouse employee has set a case on its end, which has no cleats, or placed it against the wall, thus shutting off the air circulation in part, with the result that the pips, according to Pioneer's witnesses, have sprouted as much as four or five inches in a refrigerated warehouse (E. Patterson, R. 161-163, 166, 167; H. Patterson, R. 176, 177, 183, 184).

When the Holland-America Line refused to carry the shipment there were no other vessels with refrigerated compartments available at Rotterdam. Therefore Pioneer, in order to get its pips out of Holland before the imposition of the British embargo, was obliged to ship them on some

vessel without refrigeration. The respondent operated a steamship line to Rotterdam and had the steamer Lafcomo under charter from the respondent, Tampa Inter-Ocean, under the usual Government form of time charter (Cl. Ex. D; R. 900), and the Lafcomo was at Rotterdam in November.

Pioneer, through its forwarding agents at Rotterdam, P. A. Van Es & Co. (hereafter called "Van Es"), booked the shipment on November 25, 1939, with the petitioner's Rotterdam agents, Van Nievelt Goudriaan & Co. (hereafter called "Van Nievelt"), for carriage on the Lafcomo. The booking arrangements were made over the telephone by A. J. H. Van Noort, acting for Van Es, and Willem Kruyne, an employee of Van Nievelt. The Lafcomo, a well deck ship of the Hog Island type, had no refrigeration compartments, as Pioneer's agents knew (Van Noort, Cross Int. 28; R. 617, 618).

Van Noort, in the first conversation with Kruyne, instructed that the pips be stowed on the ship's fore deck in order to insure maximum ventilation and that they be covered with tarpaulins for protection from the elements. Kruyne then telephoned H. Hollaar, the petitioner's European port captain, whose office was at the pier, and advised Hollaar of the shipper's request. Hollaar was the one who had charge of laying out the cargo and knew what spaces were available. The petitioner had had extensive experience in the carriage of Dutch flower bulbs, but had never carried pips before as it had no refrigerated ships (Hollaar, Dir. Ints. 5, 22; R. 652, 653, 661, 662).

Hollaar was greatly surprised that the shipper should want lily of the valley pips stowed on deck and told Kruyne that there was space available in the squares of the hatches in the Nos. 1 and 2 tween decks and asked him to offer that space to the shipper. Good ventilation would have been secured in these spaces, and, besides, the pips would have

been protected there. Hollaar emphasized the necessity of ventilating the pips and pointed out that they would have no ventilation whatever if surrounded by tarpaulins. He said that tarpaulins furthermore would afford no guarantee of protection as they could not be expected to hold up under the pounding of the seas. He said, in short, that it was an utter impossibility to fulfill the shipper's request that the pips be ventilated and at the same time be protected from the elements with tarpaulins. He told Kruyne to discuss the matter further with Van Noort along the lines above indicated (Kruyne, Dir. Ints. 9-17; R. 692-698; Hollaar, Dir. Ints. 13-23; R. 656-664; Cross Int. 3; R. 673-675).

Kruyne thereupon telephoned Van Noort, offered him the under-deck stowage and discussed with him the advantages and disadvantages of using tarpaulins and informed him that if the cargo was to be stowed on deck it could not be given both the ventilation required and protection from the elements. Van Noort, according to Kruyne, still insisted that the pips be stowed on the fore deck, but withdrew his request for tarpaulins. Kruyne immediately so advised Hollaar (Kruyne, Dir. Ints. 12, 16-26; R. 693, 694, 696-703; Hollaar, Dir. Ints. 24, 25; R. 664; Van Someren, Dir. Ints. 2-13; R. 725-731). Van Noort admitted that he had been offered under-deck stowage and had declined it, but denied that he withdrew the request for tarpaulins (Cross Ints. 29, 30; R. 618).

Following the booking, 1760 cases of pips were delivered alongside of the Lafcomo by lighter and 167 cases were delivered at the pier by truck on the afternoon of November 25th. They were loaded on the afternoon and evening of November 26th.

Clause 8 of the charter (Cl. Ex. D; R. 900) provided in part as follows:

> "* * * Charterers are to load, stow and trim the cargo at their expense under the supervision of

> the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts."

The charter also contained the following clause:

> "26. Nothing herein stated is to be construed as a demise of the vessel to the Time Charterers. The owners to remain responsible for the navigation of the vessel, insurance, crew, and all other matters, same as when trading for their own account."

The loading of the cargo was done by a Rotterdam stevedoring concern, N. V. Thomsen's Havenbedrijf, who were hired and paid by the petitioner's Rotterdam agents (Hollaar, Dir. Int. 27; R. 665).

Hollaar planned the loading and stowage of the cargo in co-operation with the master and officers of the Lafcomo. He informed them that Pioneer wanted the pips stowed on the fore deck, discussed all details of the stowage with them, and agreed with the master as to the manner of stowing the cargo (Dir. Ints. 28, 33; R. 665, 666, 668; Cross Ints. 7, 13-A; R. 676, 677, 683, 684).

The pips were stowed to a height of about six feet on the forward well deck, on both sides of the No. 1 and No. 2 hatches. They occupied most of the deck except for spaces running athwartships between the hatches and between the No. 2 hatch and the bridge deck bulkhead. A vertical space of about four inches was left between the outside cases and the bulwarks for drainage (Findings No. 24 and 25; R. 934).

The petitioner supplied the rope nets which were used in securing the cargo but the remaining cargo gear was furnished by the ship (Hollaar, Dir. Int. 13(A); R. 683, 684; Wood, R. 563). The stevedores laid down the dunnage on the deck, installed fence boards at the bulwarks, loaded the cargo, and did the actual placing of the cases in the stow (Haegens, Dir. Ints. 6-8; R. 782, 783; Anderson, Dir. Ints. 6-9; R. 787-789). Wood, the ship's chief

officer, together with the captain and the second officer, were present during the loading and stowage of the cargo. The chief officer had final supervision of the stowage. He stated that he was there to see that the cargo was stowed so that it would not be damaged or make the ship unseaworthy and that if there was anything about the stowage of which he did not approve he would order the stevedores to change it (R. 562, 573-577). The cargo was lashed and secured by the ship's crew under the supervision of the master and chief officer (R. 573, 576). Hollaar exercised a general supervision over the loading and stowage, but, independently of him, the final supervision was in the hands of the master and officers of the ship (Cross Int. 13; R. 683-685; Wood, R. 577). Kruyne having informed Hollaar that the shipper's representative had revoked his demand for tarpaulins, Hollaar so advised the ship's officers and the stevedores and the pips were not covered (Cross Int. 13(E); R. 683, 684).

The bill of lading, which was drawn up by Pioneer's agents, Van Es, was dated November 26, 1939. It contained a stamped clause reading "Shipped on deck at Shippers' risk" and made no mention of tarpaulins or covering of any sort (Lib. Ex. 7; R. 878; Finding No. 26; R. 934, 935).

The Lafcomo completed her loading on November 27th and shifted into the stream on November 28th, awaiting favorable weather. She got away on November 29th and arrived in New York on December 16th (Finding No. 33; R. 937, 938).

During the voyage the Lafcomo encountered gales and heavy seas, with wind forces up to force 8, and on one occasion force 9, Beaufort Scale. Much water was shipped over her forward deck. On December 9th an unusually heavy sea came aboard and tore loose the starboard ladder to the lower bridge and broke up a few of the cases. Some sacks of napthalene were washed away from the after deck but no cases of pips shifted or were lost overboard (Find-

ing No. 33; R. 937, 938). The voyage was an unusually warm one for that time of year, with temperatures in the fifties day after day. The temperatures ranged from a minimum of 33 degrees to a maximum of 66 degrees, with an average of about 52 degrees F. (R. 28-33).

On discharge the pips were found to be wet and it was ascertained that the water which wet them was salt water. Elaborate tests were made by the Boyce-Thompson Institute in Yonkers, N. Y., at the request of H. Patterson & Sons, prospective buyers of some of the pips, to determine whether the salt water had damaged them. The Pattersons also planted many of the pips for the same purpose. The tests showed that salt water was damaging to pips and it was decided that it would be commercially unprofitable to grow and market the pips, so what remained of the shipment was destroyed. Pioneer claims damages in excess of $80,000.

Decisions Below.

The opinion of the District Court is printed on pages 918-928 of the record and is reported in 49 Fed. Supp. 559, under the title of *Pioneer Import Corporation* v. *The Lafcomo, et al.* The Court's findings of fact and conclusions of law are printed at pages 928-946 of the record. The opinion of the Circuit Court of Appeals is printed at pages 976-978 of the record. It has not yet been reported.

The District Court found that the shipper did not withdraw its request that the goods be covered with tarpaulins and that the parties agreed that the cases should be stowed on the ship's forward deck and properly covered by tarpaulins. The testimony on this disputed point was taken under a commission issued to the United States Consul in Rotterdam. The Court held that the cargo should have been stowed on the tops of the Nos. 1 and 2 hatches instead of on the deck plating between the hatches and the bul-

warks and that the cargo was stowed so as to block off part of the freeing ports, mooring rings and scuppers in the bulwarks, thus rendering the Lafcomo unseaworthy with respect to the carriage of the cargo. The Court held further that the stowing of the cargo, although done by the petitioner's agents and stevedores, was under the joint supervision of the ship's master and chief officer. It found that the stowage was laid out under the supervision of chief officer Wood and that some officer of the Lafcomo, principally the chief officer, was present continuously during the loading and stowage and that the master and chief officer supervised the stowage, together with Hollaar (Finding No. 23; R. 933, 934; Findings Nos. 63 and 64; R. 944). The Court held that the petitioner and the respondent, Tampa Inter-Ocean, were jointly negligent in the stowage of the cargo and held them jointly and severally liable to Pioneer. It then held that the petitioner, as between it and Tampa Inter-Ocean, must bear the whole loss because Hollaar's statement to the ship's officers, that the shipper had revoked the demand for tarpaulins, was unfounded. An interlocutory decree was awarded to Pioneer (Opinion, R. 918-928).

The Circuit Court of Appeals held that the District Court's findings were sustained by the evidence; that the shipper accepted the risk of losses from carriage on deck only so far as they occurred under proper stowage; that the Lafcomo was unseaworthy with respect to the carriage of the pips; and that the petitioner and the vessel were both liable for the damage. The Court held further that Pioneer was not at fault in insisting on deck stowage and hence that there was no basis for the application of the rule of divided damages in tort cases. It considered the case to be governed in part by this Court's decision in *Schnell* v. *The Vallescura,* 293 U. S. 296, which it cited after saying that the petitioner had not been able to prove what damage the pips would have sustained "if proper stowage had been made." It held finally that since, as the

District Court found, Pioneer's demand for tarpaulins was never withdrawn, Hollaar's statement to the master of the Lafcomo "that tarpaulins were not needed" was a "gross misrepresentation of fact" and that therefore the petitioner should be held for the entire damage as against Tampa Inter-Ocean. The decree accordingly was affirmed (R. 976-978).

Questions Presented.

1. Where a steamer has been chartered under the Government form of time charter, which contains a clause providing that the charterer is to load, stow and trim the cargo at its expense, under the supervision of the captain, and the ship-owner and the charterer have participated jointly in the stowage of a shipment of lily of the valley pips on the deck of the chartered ship and have been found jointly negligent with respect to such stowage and jointly and severally liable for the damage to the cargo, does the charterer have to bear the entire damage as against the ship-owner, or vice versa, or should the loss be divided equally between them?

2. If such deck cargo, stowed under the joint supervision of representatives of the ship-owner and the charterer, is placed so close to the ship's bulwarks as partially to obstruct and block off the drainage apertures therein, thereby rendering the ship unseaworthy for the carriage of the cargo, who, as between the ship-owner and charterer, has the primary responsibility for such stowage, or are they equally responsible therefor?

3. If such deck cargo, stowed under the joint supervision of representatives of the ship-owner and charterer, is stowed on the plating of the forward deck instead of the tops of the hatches and sustains damage by sea water, does the primary responsibility for such stowage rest on the ship-owner or the charterer, as between them, or are both equally responsible?

4. If the charterer makes an agreement with the shipper that such deck cargo is to be covered with tarpaulins, and it is not covered, is the final responsibility for not covering the goods, as between ship-owner and charterer, that of the charterer or the ship-owner, or are both equally responsible?

5. If the chartered ship was rendered unseaworthy with respect to the carriage of the pips because of improper stowage participated in jointly by the charterer and the ship-owner, does the ship-owner or the charterer, as between them, bear the cargo-owner's entire loss, or should each bear one-half of the loss?

6. If the charterer's representative informs the ship's officers that the shipper has withdrawn its original demand that the pips be covered with tarpaulins and such statement proves to be unfounded, should the charterer, because of such statement, be required to bear the entire damage to the cargo as against the ship-owner, where two of the three grounds on which the Court's finding of joint negligence is based, namely, stowage of the cargo on the deck plating and in too close proximity to the bulwarks, have no relation to tarpaulins?

7. Does a shipper of lily of the valley pips, who rejects the carrier's tender of under-deck stowage and insists that the pips be stowed on the ship's fore-deck on a winter north Atlantic westbound voyage, thereby assume the risk of damage to the cargo solely through wetting by sea water which the vessel ships during the course of the voyage, irrespective of any negligence found chargeable to the carrier in the stowage?

8. Where the carrier is found at fault in the stowage, should the shipper nevertheless be required to bear half of

the loss, under the circumstances stated in the preceding question?

9. Does the rule stated by the Court below, that the shipper accepts the risk of losses from the carriage of cargo on deck only so far as they occur under proper stowage, extend to and include damage to deck cargo arising solely through the wetting of the cargo by sea water which the vessel ships during the voyage?

10. Was proof of an alleged oral agreement to cover the goods with tarpaulins, antedating the bill of lading and not incorporated therein, permissible in view of this Court's decisions in *The Delaware,* 14 Wall. 579, 603, 604, and *The Thames,* 14 Wall. 98, 105.

11. Was the lower Court correct in upholding the District Court's finding that the shipper and the petitioner made an agreement that the goods be covered with tarpaulins?

12. Was the lower Court correct in holding that the District Court's finding of negligence in the stowage of the pips was justified?

13. Did the carrier violate any duty to the shipper in stowing the pips on the ship's fore-deck, between the bulwarks and the hatches, when the shipper designated the fore-deck as the place of stowage?

14. Does the impossibility of showing the amount of damage which the pips would have sustained, if they had been covered with tarpaulins and stowed on the hatches, bring this case within *Schnell* v. *The Vallescura,* 293 U. S. 296?

Specifications of Error to Be Urged.

The Circuit Court of Appeals erred:

1. In holding that Pioneer's entire loss must be borne by the petitioner, as between it and the respondent, Tampa Inter-Ocean.

2. In failing to hold that Pioneer's entire loss should, as between the petitioner and the respondent, Tampa Inter-Ocean, be borne by the latter.

3. In failing to hold in any event that inasmuch as the stowage of the pips was a joint operation by the petitioner and the respondent, Tampa Inter-Ocean, and the damage was found due to their joint negligence, the loss should be divided equally between them.

4. In holding the petitioner liable for the entire damage, as between it and the respondent, Tampa Inter-Ocean, because of the statement of the petitioner's representative to the ship's officers that the shipper had revoked its demand for tarpaulins, which was held to be unfounded.

5. In failing to hold that the respondent Pioneer, by reason of its refusal of the petitioner's offer of stowage for the pips under deck and its insistence that they be stowed on the ship's fore-deck, assumed the risk of any damage they might sustain through wetting by sea water shipped by the vessel during the voyage.

6. In failing to hold that the risk of wetting by sea water is inherent in the stowage of cargo on deck and as such is accepted by the shipper at all events when he agrees that his goods shall be carried on deck.

7. In failing to hold, in any case, that the damages should be divided equally between Pioneer and the carrier on the ground that Pioneer was guilty of fault in rejecting the petitioner's offer of underdeck stowage and insisting on stowage on deck.

8. In permitting proof of an alleged oral agreement, not incorporated in the bill of lading subsequently issued, that the pips should be covered with tarpaulins.

9. In failing to hold that the rights of the parties were measured by the bill of lading which was issued for the goods.

10. In affirming the District Court's finding that the petitioner and the shipper agreed that the pips should be covered with tarpaulins.

11. In affirming the District Court's conclusions that the pips were negligently stowed and that Pioneer's loss resulted therefrom.

12. In holding that under this Court's decision in *Schnell* v. *The Vallescura*, 293 U. S. 296, the carrier is liable for the loss because it was impossible to show the amount of damage which the pips would have sustained had they been stowed on top of the hatches and covered with tarpaulins.

Reasons for Granting the Writ.

1. The Court below, in holding that the petitioner, as between it and Tampa Inter-Ocean, must bear Pioneer's entire loss, where the stowage of the pips was held to be a joint operation by the charterer and the ship-owner and the damage was found to be due to their joint negligence, has rendered a decision which is in conflict with the decision of the Circuit Court of Appeals for the First Circuit in *The Nidarholm*, 34 Fed. (2d) 442; 36 Fed. (2d) 227.

2. The Court below, in imposing liability on the petitioner, as against Tampa Inter-Ocean, for Pioneer's entire loss, although the Lafcomo was held to be unseaworthy with respect to the carriage of the pips, has decided a federal question in a way which is probably in conflict with the decision of this Court in *Oxford Paper Co.* v. *The Nidarholm*, 282 U. S. 681.

3. The Court below, in failing to hold Tampa Inter-Ocean liable for the entire loss, as between it and the petitioner, has rendered a decision which is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *The Seguranca*, 250 Fed. 19.

4. The Court below, in holding that Pioneer, when it refused the petitioner's tender of underdeck stowage and insisted that its goods be carried on deck, did not assume the risk of damage to its cargo solely through wetting by sea water which the vessel shipped during the voyage, has rendered a decision which is in probable conflict with the decisions of this Court in *Lawrence* v. *Minturn*, 17 How. 100, and *The Delaware*, 14 Wall. 579, 605, and with the decision of the Circuit Court of Appeals for the Ninth Circuit in *The Carrisso*, 30 Fed. (2d) 279.

5. The Court below, in holding that the risk of contact with water from seas shipped by the vessel during the voyage is not a risk inherent in the stowage of cargo on deck, which is assumed by a shipper who contracts with a carrier for deck stowage at the shipper's risk, has decided an important question of federal law which has not been, but should be, settled by this Court.

6. The Court below, in refusing to hold Pioneer to half damages in any event because of its insistence on deck stowage when it could have had under deck stowage, has rendered a decision which is in probable conflict with the

decision of this Court in *The Max Morris* v. *Curry,* 137 U. S. 1 (11 Sup. Ct. Rep. 29), and also with the decision of the Circuit Court of Appeals for the Fifth Circuit in *The Georgian,* 76 Fed. (2d) 550, affirming 4 Fed. Supp. 718, and the decision in *Snow et al.* v. *Carruth et al.,* 22 Fed. Cases, 724 (No. 13, 144).

7. The Court below, in enforcing against the petitioner on oral agreement with the shipper that the goods should be covered with tarpaulins, allegedly made before the execution of the bill of lading, and not incorporated therein, has decided a federal question in a way probably in conflict with the decisions of this Court in *The Delaware,* 14 Wall. 579, 603, 604, and *The Thames,* 14 Wall. 98, 105.

8. The decision below is erroneous in upholding the District Court's finding that a prior oral agreement was made by the petitioner with the shipper to cover the pips with tarpaulins.

9. The decision below is erroneous in holding that the stowage of the pips was negligent and was the proximate cause of Pioneer's loss.

10. The Court below, in holding the petitioner liable under *Schnell* v. *The Vallescura,* 293 U. S. 296, because of the petitioner's inability to prove what the damage to the goods would have been had they been stowed on top of the hatches and covered with tarpaulins, has decided an important question of federal law which has not been, but should be, settled by this Court.

Wherefore, your petitioner, referring to the annexed brief in support of the foregoing reasons for review, respectfully prays that this Honorable Court issue a writ of certiorari, directing the United States Circuit Court of Ap-

peals for the Second Circuit to certify and send to this Court a full and complete transcript of the record herein, to the end that the said cause may be reviewed and determined by this Court, as provided by law, and that the decree of the Circuit Court of Appeals may be reversed, and that your petitioner may have such other and further relief as to this Honorable Court may seem just.

Dated, December 24, 1943.

BLACK DIAMOND LINES, INC.,
Petitioner,

By JOHN W. CRANDALL,
Counsel for Petitioner.